No. 80348-0

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

GLORIA BERNARD
Respondent,

vs.

J. THOMAS BERNARD,
Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

*

I. INTRODUCTION

The husband readily concedes that the marital agreements at issue here are not fair, yet insists they be enforced. The husband relies on a misreading of this state's law governing marital agreements, and on the ostensible procedural niceties of the postnuptial "do-over" amendment, to justify enforcement of a prenuptial agreement that "ensured there would be no accumulation of community property, no opportunity for maintenance, and no just and equitable distribution of assets regardless of the length of the marriage . . ." (VI RP 13-14)

Contrary to the husband's arguments, the courts of this state have always protected economically disadvantaged spouses from agreements, entered into before or after marriage, that would prevent a fair distribution of property or support upon dissolution. This Court should take this opportunity to definitively hold that a marital agreement will not be enforced, regardless of the circumstances surrounding its execution, if it is unfair. Regardless, this Court should affirm the trial court findings that the wife did not have a voluntary and knowing opportunity to waive her statutory rights to a fair distribution of property prior to signing this unfair

prenuptial agreement, and that the postnuptial amendment did not cure its deficiencies.

II. SUPPLEMENTAL ARGUMENT

A. The Husband Has Admitted That The Prenuptial Agreement Was Unfair, And Substantial Evidence Supports The Trial Court's Findings That The Postnuptial Amendment Did Not "Cure" The Agreement's Deficiencies.

This Court accepted review of the husband's petition for review of Division One's decision, published at 137 Wn. App. 827, 155 P.3d 171, affirming the trial court's decision invalidating procedurally and substantively unfair marital agreements that would have left the wife a pauper on divorce. This Court's website now identifies the issue on review as:

> Whether a prenuptial agreement was procedurally unfair as to a spouse who first secured independent legal counsel three days before the wedding and signed the agreement against her attorney's advice?

http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2008May#P376_23561

However, the husband conceded in his petition for review that the prenuptial agreement was in fact both substantively *and* procedurally unfair. (Petition 11: "[N]o one disputes the substantive and procedural deficiencies of the prenuptial agreement.") This Court will not consider a question that is not raised in the petition for review. RAP 13.7(b). This is particularly

true when the petitioner also failed to present the question as a separate issue before the Court of Appeals. ***Douglas v. Freeman***, 117 Wn.2d 242, 257-58, 814 P.2d 1160 (1991).

Here, the husband has *never* challenged the trial court's determination that the prenuptial agreement, executed by the wife the night before the parties' wedding, was procedurally unfair. At trial, the husband testified that the prenuptial agreement standing alone was not fair. (III RP 32) On appeal, the husband conceded that there were "defects in the negotiation procedure and substance of the original July 7, 2000 Prenuptial Agreement." (App. Br. 13) As the Court of Appeals noted, the husband "does not seriously dispute that the July 7, 2000 prenuptial agreement, standing alone, was both substantively and procedurally defective." ***Bernard***, 137 Wn. App. at 834, ¶ 14. Instead, the husband claimed that substantial evidence did not support the trial court's findings that the deficiencies of the prenuptial agreement were not procedurally "cured" by a postnuptial amendment (App. Br. 13), which was itself reached based on a "side agreement" that the wife executed on the parties' wedding day, with *no* access to or advice from counsel.

When considering whether the circumstances surrounding execution of a marital agreement were fair, the court must consider

"the bargaining positions of the parties, the sophistication of the parties, presence of independent advice, understanding of the legal consequences and rights, and timing of the agreement juxtaposed with the wedding date." ***Marriage of Matson***, 107 Wn.2d 479, 484, 730 P.2d 668 (1986). "[T]he actual standard should be applied on a case-by-case basis." ***Matson***, 107 Wn.2d at 483, *citing* ***Whitney v. Seattle-First National Bank***, 90 Wn.2d 105, 109, 579 P.2d 937 (1978) (presence or absence of counsel for disadvantaged party is not dispositive). After considering the evidence presented at a four-day trial, the trial court rejected as a matter of fact the husband's claims that the postnuptial amendment cured the prenuptial agreement's defects, finding that the side agreement limited the parties' ability to amend the agreement. (CP 2401-2402, FF 2.5(18), (27))

As the trial court found, by its terms "the entire agreement was not open for renegotiation," and a fair marital agreement was no longer possible as the terms of the side agreement so limited the areas of negotiation. (CP 2402, FF 2.5(27)) Here, as set out in the Brief of Respondent at 17-19, substantial evidence supported the trial court's finding that the "wife had no reason to believe the entire agreement was open for renegotiation and by the terms of

the 'side letter,' it was not." (CP 2402, FF 2.5(27)) Indeed, the side agreement signed on the parties' wedding day had resolved the five issues raised by her attorney's July 7 letter largely in the husband's favor, unilaterally providing that the wife was limited to $400,000 and one-half of the community property if the husband died or their marriage was dissolved more than ten years after they married, but confirming the wife would receive nothing if the marriage ended earlier. (Ex. 103)

The trial court found as a matter of fact that the wife and her attorney were precluded from revisiting those issues, and others that were not addressed in the attorney's July 7 letter. (*See* Ex. 103; CP 2402, FF 2.5(27)) Both the wife and her counsel testified that they did not discuss the terms of the side agreement before she signed it. (V RP 17, II RP 5-6) By the time the side agreement was signed, the wife had already executed the prenuptial agreement, which the husband admitted was not in her best interests. (III RP 32)

Under these circumstances, the wife had "no real choice" but to sign the postnuptial amendment, as the trial court found. (CP 204, CP 2402, FF 2.5(23)) The husband testified that the marriage "would not continue" unless the wife signed the "do-over"

amendment, and if the wife did not comply with his demands she would – homeless, jobless, and destitute – become "unmarried." (II RP 41, 44; III RP 24) Substantial evidence supports the trial court's decision that the "wife did not voluntarily and knowingly waive her rights to a fair, just and equitable division of property by signing the agreement." (CP 2402, FF 2.5(26))

B. The Wife's Counsel When She Signed The Prenuptial Agreement Was Not "Independent" In Any Meaningful Sense.

Given the husband's concessions, this case does not present the issue posed on the Court's website whether the prenuptial agreement could be considered procedurally fair. Even if it did, the Court of Appeals properly held that the agreement was not procedurally fair because the agreement was not drafted "with the benefit of independent counsel, the bargaining positions of the parties were grossly imbalanced, and at no time did [the wife] have full knowledge of her legal rights." ***Bernard***, 137 Wn. App. at 835, ¶ 16. While the wife's attorney may have been "independent" in the sense that he was not hired by the husband, he could not "fulfill the primary duty of independent counsel 'assisting the subservient party to negotiate an economically fair contract'" solely because of

the husband's conduct. ***Bernard***, 137 Wn. App. at 835, ¶ 17, *citing* ***Marriage of Foran***, 67 Wn. App. 242, 254, 834 P.2d 1081 (1992).

The inability of the wife's attorney to fulfill his duty to advise her as to the prenuptial agreement was caused by the minimal time available between when the attorney first received a draft of the prenuptial agreement and the wedding date, as set out in the Brief of Respondent at 4-11. As the trial court found, based on the evidence at trial:

> Wife's attorney made [e]very effort to advise the wife of the problems of the proposed agreement but the amount of time available and the other circumstances present after he received the complete agreement and before the wedding ceremony prevented him from being able to fully advise her of all her rights or to negotiate an economically fair contract.

(CP 2401, FF 2.5(22)) While the husband assigned error to this finding, he failed to make any argument that the trial court's findings were unsupported by substantial evidence, or point to any contrary evidence in the record. The husband then conceded in his petition for review in this Court that the execution of the prenuptial agreement was procedurally deficient. (Petition 11)

Indeed, the wife's attorney advised the wife not to sign the prenuptial agreement *because* there was insufficient time before the parties' wedding the following day to address with the

husband's attorney his "concerns" about the prenuptial agreement. (Ex. 102) In other words, there was insufficient time for the attorney to fulfill his "primary purpose" as "independent counsel" to "assist[] the subservient party to negotiate an economically fair contract." ***Foran***, 67 Wn. App. at 254.

The husband could not have thought that he had given the wife an opportunity to negotiate a fair agreement, contrary to his claim now that he was somehow "lured" into entering into an unenforceable agreement. To the contrary, the wife's attorney in a letter sent to the husband's attorney explained that his advice that the wife not sign the prenuptial agreement was "probably not practical from [her] viewpoint and that of Mr. Bernard given [their] wedding tomorrow." (Ex. 102) Further, the wife testified that after she received the attorney's letter telling her not to sign the prenuptial agreement, they had a follow up phone call in which he told her to go ahead and sign the agreement, contrary to the assumptions of the question, as posed on the Court's website, that she signed against her counsel's advice. (I RP 45)

In addressing agreements between clients and attorneys, this Court has held that a party's "opportunity to seek independent advice must be real and meaningful. It is not enough that at some

moment in time an opportunity existed no matter how brief or fleeting that opportunity might have been." ***Valley/50th Avenue, L.L.C. v. Stewart***, 159 Wn.2d 736, 746 ¶ 18, 153 P.3d 186 (2007). Likewise, in agreements between spouses, the economically disadvantaged spouse must have a "real and meaningful" opportunity to obtain *and* consult independent counsel – especially where, as here, the agreement is substantively unfair. ***Estate of Crawford***, 107 Wn.2d 493, 496-97, 730 P.2d 675 (1986). Just as the absence of independent counsel alone is insufficient to set aside an otherwise enforceable agreement, ***Matson***, 107 Wn.2d at 483; ***Whitney***, 90 Wn.2d at 109-10; ***Marriage of Hadley***, 88 Wn.2d 649, 655, 565 P.2d 790 (1977), the presence of counsel alone is not sufficient to validate an otherwise unenforceable marital agreement. Instead, "the actual standard [is] applied on a case-by-case basis." ***Matson***, 107 Wn.2d at 483.

"The purpose of independent counsel is more than simply to explain just how unfair a given proposed contract may be; *it is for the primary purpose of assisting the subservient party to negotiate an economically fair contract.*" ***Foran***, 67 Wn. App. at 254 (emphasis in original). As in this case, when the "primary purpose" of independent counsel is undermined by the failure to timely

provide a draft of the proposed prenuptial agreement, the mere fact that the wife was able to retain an attorney willing to look at the agreement at the eleventh hour is insufficient to validate a substantively unfair agreement. *See* ***Foran***, 67 Wn. App. at 252, fn. 10 (wife first saw prenuptial agreement two days before the parties' departure for their wedding trip; even if wife had seen an attorney in those two days "there would not have been sufficient time to negotiate an economically fair contract before [their] departure") (*discussed at* Resp. Br. 30-32). Even if this case raised the issue posed on the Court's website, substantial evidence supports the trial court's decision.

C. This Court Should Take This Opportunity To Hold That An Unfair Marital Agreement Will Not Be Enforced, Regardless of the Circumstances Surrounding Its Execution.

Unfortunately, the husband's conduct here follows a predictable pattern – last-minute, unyielding demands for a prenuptial agreement that prevents the accumulation of community property and the fair division of the marital estate or reasonable support of the economically disadvantaged spouse at death or divorce, followed by scorched-earth litigation tactics to "enforce" this unjust result after a separation often made inevitable by the "agreement" itself. The husband does not even pretend the

agreements at issue in this case could ever be considered fair. Although this Court can affirm simply by rejecting the husband's claim in the petition for review that substantial evidence did not support the decisions below, this Court instead should take this opportunity to make clear that a marital agreement must be both substantively *and* procedurally fair to be enforceable.

As argued in the Brief of Respondent at 43-47, a requirement of substantive and procedural fairness is compelled by the Dissolution Act for the enforcement of marital agreements, and has been imposed by this Court on contracts between parties with far fewer responsibilities to one another than the spouses here. A holding from this Court confirming these requirements will have the salutary effect of reducing both last-minute efforts to extract unfair prenuptial agreements that can needlessly poison the marriage relationship, and protracted litigation concerning the enforcement of these unfair agreements.

A rule requiring substantive and procedural fairness is compelled by the Dissolution Act, which only authorizes enforcement of an agreement between spouses "providing for . . . maintenance [and] the disposition of any property owned by both or either of them" that was not "unfair at the time of its execution,"

"considering the economic circumstances of the parties and any other relevant evidence." RCW 26.09.070(1), (3). The Dissolution Act provides no "out" for enforcement of a substantively unfair agreement on the grounds of procedural fairness. Instead, the analysis under RCW 26.09.070 is focused on the fairness of the agreement given the parties' economic circumstances when the agreement is reached.

Marital agreements that prevent or limit the acquisition or distribution of community property are unfair. *See* ***Crawford***, 107 Wn.2d at 498; ***Foran***, 67 Wn. App. at 249-51. Under the agreements here, the only community property that could accrue during the marriage would be what was left after paying living expenses from a "joint living account," which the marital agreements required the wife to fund while limiting the husband's obligation to do the same. (Ex. 101 at 5) The wife would have been entitled to only one-half of that account, and prohibited from seeking spousal support. (Ex. 101 at 10-11) Despite the wife's labor in the husband's business, she had received only a minimal salary, while the husband's separate property estate grew due to both their efforts. (*See* CP 13-14) Because the wife's salary (unlike the husband's income) was considered community property,

and she was obligated to contribute to the "joint living account," she had no ability to procure any separate property of her own. (*See* Ex. 101 at 4) The agreements here were unfair and unenforceable because they both unfairly characterized, and then prohibited the equitable division of, the marital estate.

The marital agreements at issue were also unfair and unenforceable because they made *no* provision for, and prohibited an award of, maintenance. RCW 26.09.070 authorizes enforcement of an agreement "*providing* for the maintenance of either of" the spouses, *not* agreements *preventing* the court from considering the need for or ability to provide support. RCW 26.09.070(1)(emphasis added); *see* RCW 26.09.050(1); RCW 26.09.090. Likewise, RCW 26.09.070(1) does not "bind the court" to enforce an agreement that would prevent an award of fees under RCW 26.09.140 if an award was otherwise justified. Yet the marital agreements at issue purported to authorize an award of fees only to a "prevailing party," contrary to the need/ability standard of RCW 26.09.140. *See* ***Leslie v. Verhey***, 90 Wn. App. 796, 806, 954 P.2d 330 (1998) (mandatory arbitration rules could not prevent fee award under RCW 26.09.140), *rev. denied*, 137 Wn.2d 1003 (1999); ***Marriage of Burke***, 96 Wn. App. 474, 479, 980 P.2d 265 (1999)

(parties could not contract away right to fees under RCW 26.09.140 when interests of children were involved).

Requiring that an agreement be fair in order to be enforceable is also consistent with the fiduciary responsibilities of spouses toward one another, and with the courts' obligation to insure a fair and equitable division of property and adequate support on divorce. To instead encourage parties to attempt to negotiate marital agreements that do not adequately provide for the economically disadvantaged spouse, by allowing enforcement of such agreements if procedural niceties are observed, fails to recognize the strong likelihood for abuse in the parties' inherent bargaining inequality. *See* ***Foran,*** 67 Wn. App. at 254-55.

Subject to the parties' special fiduciary responsibilities to one another, marital agreements are contracts governed by the principles of contract law. ***Burke***, 96 Wn. App. at 477. Either procedural or substantive unconscionability may make an agreement unenforceable. ***Adler v. Fred Lind Manor***, 153 Wn.2d 331, 347 ¶18, 103 P.3d 773 (2004) ("substantive unconscionability alone can support a finding of unconscionability" making an agreement unenforceable; considering arbitration clause in employment contract); *see also* ***Zuver v. Airtouch***

Communications, Inc., 153 Wn.2d 293, 317-19, ¶ 36, 103 P.3d 753 (2004) (substantively unconscionable damage limitation clause in telephone contract unenforceable). An economically disadvantaged spouse is entitled to at least the protection against unfair contract provisions that this Court would extend to a nursing home employee or a telephone customer.

The analysis proposed by this section of respondent's supplemental brief is consistent with that set out in Justice Pearson's concurring opinion in ***Marriage of Matson***, 107 Wn.2d 479, 730 P.2d 668 (1986) – this Court's last statement on the enforceability of prenuptial agreements on divorce. Justice Pearson recognized that under RCW 26.09.070, the enforcement of a prenuptial agreement does not turn on the procedural niceties involved in its execution, but on whether the agreement was "fair" at the time of its execution, "after considering the economic circumstances of the parties and any other relevant evidence:"

> This provision permits the trial court to make the fairness determination with the benefit of all available facts, including the current circumstances of the parties. If, from the time of its execution, the contract prevented the accumulation of community property, and one spouse neither had accumulated separate property prior to the marriage nor had the opportunity to accumulate separate property during the marriage, the prenuptial agreement could be deemed unfair at

> execution, even if otherwise valid, if it would result in an unfair disposition upon enforcement.

Matson, 107 Wn.2d at 490 (Pearson, J., *concurring)*.

Although the Bernards' marriage did not endure as long, just as in ***Matson*** "an agreement which, by its terms, would leave one spouse virtually penniless after 13 years of marriage can hardly be deemed fair." ***Matson***, 107 Wn.2d at 491-92. Indeed, the husband in this case concedes that the agreements he seeks to enforce are substantively unfair. This Court should take this opportunity to confirm that the agreements are as a consequence unenforceable, regardless of the circumstances of their execution.

D. This Court Should Award The Wife Attorney Fees.

The wife has extremely limited funds, which have been further diminished by this extraordinarily protracted litigation. By his own admission, the husband is a "successful property development business owner" and "multi-millionaire." (Petition 5; App. Br. 14) His claim on appeal is, in essence, that because their marriage provided the wife with "a life-style that she had never experienced and ultimate wealth beyond anything she could have otherwise hoped for" (App. Br. 38), she should now be happy to pay his attorneys for the privilege of leaving the marriage destitute, as a result of concededly unfair agreements. As did the Court of

Appeals, this Court should award the wife her fees on appeal. RCW 26.09.140, RAP 18.1.

III. CONCLUSION

By statute, and as a matter of public policy, only fair marital agreements may be enforced when the parties' marriage is dissolved. This Court should affirm the decisions of the courts below striking down the marital agreements in this case, award the wife her fees in this Court, and remand for a division of property and determination of support and fees under the equitable principles of the Dissolution Act.

Dated this 5th day of May, 2008.

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FILED AS ATTACHMENT TO E-MAIL

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 5th, 2008, I arranged for service of the foregoing Supplemental Brief of Respondent to the court and the parties to this action as follows:

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DATED at Seattle, Washington this 5th day of May, 2008.

Carrie O'Brien